IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1085

SAMUEL SALVADORE PERNICIARO,
Petitioner,

versus

UNITED STATES OF AMERICA.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a rehearing be granted for the petition for a *writ of certiorari* to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 14th day of April, 1947.

QUESTIONS PRESENTED BY FORMER PETITION

The original petition for a *writ of certiorari* presented the following questions:

1. Count eight of the indictment, in charging that Perniciaro did not report to Local Board Number 8 the fact that he was "loafing" and "sleeping on the job", charged no crime known to the laws of the United States, and his conviction thereunder deprived him of due process of law contrary to the Constitution of the United States; and

2. That if Section 11 of the Selective Training and Service Act, supplemented by Section 626.1 (b) of the Regulations of the National Director of Selective Service, does purport to create a crime the essentials of which are a failure by a deferred civilian worker to report to the Local Board the fact that while officially employed and physically present in an essential industry he was not working to the utmost of his capacity or was outrightly loafing, then the Section and the regulation are null and void and unconstitutional and should be so declared by this Honorable Court for failure to create a definite and certain standard.

Regarding the above conclusions we do not intend to reargue what we have previously set out in the original petition for *certiorari*. Our position was that on its face Regulation 626.1 should not be construed to say a deferred worker had the duty to report to his local board his degree of application to the job for which he was deferred. If the regulation was so interpreted, then we argued, the regulation was invalid and unconstitutional as employing too vague a standard. For at what degree of inattention to work and at what degree of sheer loafing does one assume the role of a criminal for failure to report such to the local board?

We re-urge these grounds here.

The only answer to these issues made by the Acting

Solicitor General in his brief was to say that this matter of vagueness in the regulation has been determined in *Stassi v. United States*, 152 F. (2d) 581, *certiorari* denied, 328 U.S. 842. In the *Stassi* case the worker actually ceased presenting himself for work and to all intents and purposes quit the job for which deferred. The court held it was not a vague duty to say that he should report such to the local board. We agree.

But Perniciaro did not quit. He spent every working day in the shipyard. But the indictment charges that he loafed on the job. Our argument is that it is a vague and uncertain standard to legislate that Perniciaro committed a crime when his loafing reached an unknown and uncertain degree without reporting same to the local board.

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Mogall and Perniciaro were joint defendants. Both sought *writs of certiorari* to the Circuit Court of Appeals for the Fifth Circuit. Mogall was granted a writ on April 14th, 1947 and Perniciaro's petition was denied.

Mogall's reason relied on for the issuance of a *writ of certiorari* was as follows:

> "(1) That the verdict of Guilty on count eight of the Indictment, is unreasonable, is wholly inconsistent with and is repugnant, to the Jury's finding in defendant's favor of 'Not Guilty' on the first seven counts of the Indictment, thereby rendering the verdict of Guilty on count eight of the Indictment void."

This was the only reason advanced in the interest of Mogall. It is the same reason on which both defend-

ants sought and were denied a rehearing by the Circuit Court.

We now petition this Court to grant Samuel Salvadore Perniciaro a *writ of certiorari* on this above stated ground, noting that Mogall and Perniciaro were joint defendants on each count of the original indictment and any inconsistency in the verdicts rendered which deprived Mogall of his constitutional rights likewise deprived Perniciaro of those guaranted rights.

We respectfully pray that this Court rehear and reconsider the original petition for a *writ of certiorari* to the Circuit Court of Appeals for the Fifth Circuit and again pray that such writ be granted so that the entire question may be reviewed in the Supreme Court of the United States and particularly so that both defendants may be heard on a question which involves them equally.

Respectfully submitted,

HUGH M. WILKINSON, SR.,
JOHN D. LAMBERT,
HUGH M. WILKINSON, JR.,
Attorneys for Petitioner.

By_____

I hereby certify that the above petition for a rehearing is filed in good faith and upon a real and substantial ground, and not for mere purposes of delay.

Dated New Orleans, Louisiana, April ____, 1947.

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Hugh M. Wilkinson, Sr.
Of Counsel for Petitioner.